In the Supreme Court of the United States.

GIOVANNI LAVAGNINO,

Plaintiff in Error,

vs.

EDMUND H. UHLIG, ALEXANDER McKERNAN AND THE ST. JOE MINING COMPANY,

Defendants in Error.

No. 120

MOTION TO DISMISS.

Now come the said defendants by Arthur Brown and D. H. Wenger, their attorneys, for the purposes of this motion, and move to dismiss the said cause for want of jurisdiction in this court, for the following reasons, to-wit:

FIRST: The Supreme Court of the State of Utah decided said cause on other than a federal question, and no federal question was raised in its decision.

SECOND: The decision of a federal question was not necessary to the final determination and decree of the Supreme Court of Utah.

THIRD: That no federal question is raised by the assignments of error, and no federal question is involved in this case. The foregoing motion will be submitted to the court on the first Monday in December, 1904.

D. H. WENGER,
ARTHUR BROWN,
Attorneys for Defendants.

STATE OF UTAH,
COUNTY OF SALT LAKE. } ss.

D. H. Wenger, being duly sworn, deposes and says: I served the foregoing notice of motion to dismiss the said cause for lack of jurisdiction, upon E. M. Allison, one of the attorneys for plaintiff in error, on this 31st day of October, 1904.

D. H. WENGER.

Subscribed and sworn to before me this 31st day of October, 1904.

[SEAL.] FREDERICK C. LOOFBOUROW,
Notary Public in and for Salt Lake County, Utah.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

GIOVANNI LAVAGNINO,
Plaintiff in Error,
vs.
EDMUND H. UHLIG, ALEXANDER McKERNAN AND SAINT JOE MINING COMPANY, A CORPORATION,
Defendants in Error.

No. 120

BRIEF OF DEFENDANTS IN ERROR ON MOTION TO DISMISS APPEAL.

The defendants in error respectfully contend, that this court has no jurisdiction in this case for the following reasons:

1st. That the decision of the Supreme Court of the State of Utah decided said cause on other than a federal question. (Tr. 147, 148, 149.)

2nd. That under the decision of the Supreme Court of the State of Utah, this court has no jurisdiction to hear and determine the question raised under Sec. 452, Rev. Stat. U. S., for the reason that the plaintiff in error has not brought himself within the provisions of Sec. 709, Rev. Stat. U. S. (Tr. 142, 143, 152, 153.)

The defendants in error, for the purpose of submitting the motion to dismiss the appeal, will submit such

parts of the record as are necessary for the purpose of determining this motion. The pleadings are drawn in the ordinary form of adverse proceedings in mining litigation, to determine the rights of possession to mining claims.

The suit was brought by the plaintiff in error, Giovanni Lavagnino vs. Edmund H. Uhlig, Alexander McKernan and the St. Joe Mining Company, adversing the application for a patent of the Uhlig No. 1 and the Uhlig No. 2, made by the defendants in error, with the alleged Yes You Do, by the plaintiff in error, in the Third Judicial District Court of the State of Utah. There is nothing in the pleadings indicating a federal question.

In the trial of said cause in the District Court, the court found the issues for the defendants, and filed the following findings of fact:

FINDINGS OF FACT.

"1. That the plaintiff herein has failed and neglected to prosecute his action against the above named defendant, Alex. McKernan, and that prior to the trial of this cause the said action of plaintiff as to the defendant Alex. McKernan was by the court dismissed.

2. That after the commencement of this action, and before the trial of the same the defendant, Edmund H. Uhlig, assigned, transferred and conveyed to the Saint Joe Mining Company, a corporation, under the laws of Utah, all his right, title and interest in and to the premises in the complaint and answer herein described as the 'Uhlig No. 1' and 'Uhlig No. 2' Lode mining claims, and by an order duly entered in this cause the said Saint Joe Mining Company was and is substituted in lieu of the said Edmund H. Uhlig as defendant herein.

3. That the plaintiff herein introduced upon the trial of this cause no legal or competent evidence to sustain the allegations of the complaint or to sustain the issues upon the part of plaintiff, and

upon the trial, on motion of counsel for defendants, the said action of the plaintiff against the defendant was and is hereby dismissed.

4. That on or about the first day of January, 1889, one Edmund H. Uhlig, then and there a citizen of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States in West Mountain Mining District, Salt Lake County, State of Utah, and having discovered thereon a lode of mineral-bearing rock in place bearing lead, iron, silver and other minerals, did then and there locate the same as the 'Uhlig No. 1' and 'Uhlig No. 2' lode mining claims, by marking the boundaries thereof upon the ground by suitable monuments, so that the boundaries thereof could be readily traced, and by posting at the points of discovery upon said mining claims respectively notices of location, describing the same by reference to natural objects and permanent monuments; that thereafter he caused copies of said notices of location, respectively, to be duly filed and recorded in the office of the district recorder of said West Mountain Mining District.

5. That thereafter the said Edmund H. Uhlig and the defendant, the Saint Joe Mining Company, remained in possession of said mining claims, working and developing the same and causing to be done thereon and for the benefit of said claims in each and every year up to and including the year 1900 the annual assessment work required by the laws of the United States.

6. That thereafter by divers deeds properly executed and of record in the office of the county recorder of Salt Lake County, Utah, the said Edmund H. Uhlig conveyed all of said 'Uhlig No. 1' and 'Uhlig No. 2' lode mining claims to the defendant, the Saint Joe Mining Company, and to Alexander McKernan, and that prior to the commencement of this action, to-wit, on the 24th

day of August, 1898, the said Edmund H. Uhlig, the predecessor in interest of the Saint Joe Mining Company, and the said Alex McKernan, in due form, made application for United States patent for the said 'Uhlig No. 1' and 'Uhlig No. 2' lode mining claims in the United States land office at Salt Lake City, Utah, against which said application the plaintiff herein filed his adverse claim, and afterwards brought this action against the said defendants for the purpose of determining the title and right of possession of the premises set forth and described in the complaint herein as the area in conflict between the 'Uhlig No. 1' and 'Uhlig No. 2' lode mining claims, and the alleged 'Yes You Do' mining claim."

Paragraph seven sets forth the full and complete description of the "Uhlig No. 1" and "Uhlig No. 2" lode mining claims. (Tr. 37, 38.)

From the foregoing findings of fact the court found its

CONCLUSIONS OF LAW.

That the action against the defendants should be dismissed.

That the defendants are the owners of and in possession of the premises and entitled to a decree quieting title in favor of the defendants.

DECREE.

Decree in favor of defendants in accordance with the finding of fact and conclusions of law.

From a decree in favor of the defendants, plaintiffs appealed to the Supreme Court of the State of Utah, assigning as error that the District Court erred in sustaining the objection to the admission in evidence of the location of the Yes You Do mining claim and the deed to Lavagnino offered in connection therewith.

The following is the statement of facts, as set out by the Supreme Court of the State of Utah:

"The defendants, Edmund H. Uhlig and Alex. McKernan, on or about the 24th day of August, 1898, made an application in the United States land office at Salt Lake City, for a patent for the Uhlig No. 1 and Uhlig No. 2 mining claims. The plaintiff, in due time, filed in said land office an adverse claim to a portion of the said Uhlig Nos. 1 and 2, which overlapped and included a part of the 'Yes You Do' mining claims. Thereupon further proceedings on said application were stayed in the land office, and the plaintiff in due time instituted this action to determine, as provided in Section 2326 of the Revised Statutes of the United States the right to the possession of the portion of the Uhlig Nos. 1 and 2 which conflicts with the Yes You Do.

It appears from the record that the summons in respect to the defendant, Alex. McKernan, was quashed, and the action as to him was discontinued; that pending the action, which was not dismissed as to the co-defendant, Edmund H. Uhlig, and before the trial, he conveyed his interest in the Uhlig Nos. 1 and 2 to the Saint Joe Mining Company, a corporation, organized under the laws of the State of Utah, and said company was substituted as defendant in place of the said Edmund H. Uhlig. The trial court adjudged and decreed that the St. Joe Mining Company and the said Alex. McKernan are the owners in possession, and entitled to the possession, except as against the paramount title of the United States, of the premises in dispute (which was described in the decree by metes and bounds) and that the defendant recover its costs, etc. From this decree the plaintiff has taken an appeal.

It appears from the testimony of J. Fewson Smith, Jr., a witness for the plaintiff, that he located the 'Yes You Do' on the 1st of January, 1898; that at that time and at the time of the trial he

was a deputy United States mineral surveyor, 'attached to the office of the surveyor general of the district of Utah;' that he had an interest in the litigation; that between the time of making said location and the time of filing the protest in the land office by the plaintiff he agreed with plaintiff to convey to him the 'Yes You Do' mining claim for the consideration of one dollar, and the sum of six hundred dollars, the future payment of which depended upon the conditional stipulations, the substance of which is as follows: If a patent for said claim should be obtained without litigation Lavagnino, the plaintiff, was to pay $600, but if there was litigation through any source, in respect to said claim, and a failure to procure patent for the same, then no part of the $600 was to be paid for the conveyance. In case there was such litigation then the said Smith was only to be paid said sum less the expense of patenting the claim, if one should be obtained, but if a patent was only obtained for a small triangle, or part of the claim, the plaintiff might refuse to pay the remainder of the consideration. In pursuance of the foregoing agreement the claim was deeded to the said plaintiff by Smith, but the only consideration named therein was the sum of one dollar.

The said Smith also testified that 'when he transferred the ground to Lavagnino it was for the purpose of defeating these other claims and not with a view of making much;' and having further testified that he made the plat showing the conflict in question in this case, he was asked, on cross-examination, the following question: Isn't it a fact that you being a deputy United States mineral surveyor couldn't make the survey and protest for your claim if you held it in your own name, and you consequently turned it over to Mr. Lavagnino?"

A.—"It is a fact that I couldn't make the protest in

my own name while I held an interest in the claim."

After the disclosure of the foregoing facts the plaintiff offered in evidence a certified copy of the location notice of the 'Yes You Do' and in connection therewith the deed to Lavagnino. To this offer the defendant objected upon the grounds, which in substance, were as follows: That by the testimony of the witness, J. Fewson Smith, Jr., it appears that said mining claim was not located by a person who had the power, under the Act of Congress, to locate mineral ground, it appearing from the testimony of the witness that he was at the time mentioned, January 1st, 1898, a deputy United States mineral surveyor for Utah, and therefore, incompetent to make locations; that in this particular action it now appears that the witness, at the time he made the protest map, plat and survey, fixing the boundaries for the purpose of an adverse claim and protest introduced in the land office, was himself a deputy United States mineral surveyor, interested in the action, as he himself has stated, therefore the location itself was in violation of the law, and could not be the basis either of a valid location in himself or a deed to anybody.

The trial court excluded the said notice and deed on the ground that 'J. Fewson Smith, Jr., the locator of the claim was prohibited from making the location of a lode mining claim, and therefore had not the qualifications to initiate any title by any act that he did with reference to locating the 'Yes You Do' mining claim. The plaintiff after duly excepting to the ruling of the court rested. The defendant then proceeded to introduce evidence in support of the validity of the Uhlig Nos. 1 and 2 mining claims, after which, in rebuttal, the plaintiff offered to show that the 'Levi P.' and 'Veta' mining claims, at

the time of the location of the Uhlig Nos. 1 and 2, were valid and subsisting claims and covered the discoveries of both the Uhlig Nos. 1 and 2, and were then owned by Andrew P. Mayberry.

The trial court sustained the objection on the ground that as no adverse claim, based upon the 'Levi P.' and 'Veta' claims had been made within the prescribed period, whatever rights the parties may have had to said claims were waived by failure to properly adverse the application for a patent by the defendant.

It does not appear from the record that any adverse claim, whatever, based upon the 'Levi P.' and 'Veta' was made in the land office, in the matter of the defendant's application for a patent of the Uhlig Nos. 1 and 2; nor does the plaintiff claim any interest in said mining claims." (Tr. 140, 141, 142, 143.)

After stating the facts, Baskin, C. J., delivered the opinion of the court:

"The refusal to permit the certified copy of the location notice of the 'Yes You Do' and the deed offered in connection therewith to be introduced in evidence, and the rejection of the evidence relating to the Levi P and Veta mining claims is assigned as error.

Section 452 U. S. Rev. Stat. provides: 'The officers, clerks and employees of the general land office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands; and any person who violates this section shall forthwith be removed from his office.'

"Subsequent to the enactment of this section, Sec. 2319 of the U. S. Rev. Stat. was passed, and is as fololws: 'All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase and the

lands in which they are found, to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are not inconsistent with the laws of the United States.'

The former section has been retained in all of the revisions of said statutes made since its enactment.

These sections are, therefore, in *pari materia* and must be construed together, and if possible, made to harmonize and not to violate the general public policy, which, it is evident, the former was enacted to prevent. Before making the adverse claim and bringing this suit, Lavagnino knew that Smith was a U. S. mineral surveyor, and for him, as such, made the survey and plat filed in the land office with the adverse claim, so that, if Section 452 includes deputy mineral surveyors, Lavagnino, before expending any sum, except one dollar, was at the time advised of the fact, if he was not before; that his agreement with Smith was in violation with the provisions of said section, and that the conveyance of the 'Yes You Do' for that reason was invalid.

We think that the section in question includes mineral surveyors and prohibits them as held by the land department from entering any of the public lands while they are such deputies, also from directly or indirectly acquiring any interest in the purchase from the government of the same. It follows, that if J. Fewson Smith, Jr., while he was a deputy mineral surveyor, was prohibited by said sections from entering a mining claim, and directly or indirectly acquiring any right or interest in the purchase from the government of such a claim, he was also prohibited at that time from doing of the acts upon the performance of which, under the provisions of the min-

ing law of 1872, the right of making and entering or purchasing from the government depends, and that his location of the 'Yes You Do' was therefore void, and Lavagnino acquired no right under the deed to him of the same.

The objection to the admission in evidence of the certified copy of the notice of location of the 'Yes You Do' and the deed to Lavagnino in connection therewith, and the objection to the evidence relating to the Levi P. and Veta mining claims were properly sustained."

As will be seen by said decision of the Supreme Court of the State of Utah, said Sections 452 and 2319 of the Revised Statutes of the United States would read, if put together, as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the land in which they are found, to occupation and purchase by citizens of the United States and those who become such;" provided that, however, "the officers, clerks and employees of the general land office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands;" and that said prohibition includes deputy United States mineral surveyors.

The Supreme Court of the State of Utah, however, held it was immaterial whether J. Fewson Smith. Jr., was a deputy United States mineral surveyor and decided the case on other grounds as will be seen by reference to the decision of the Supreme Court of the State of Utah, where the court holds as follows:

"The trial court found that 'on or about the first day of January, 1889, one Edmund H. Uhlig, then and there a citizen of the United States, entered upon the unoccupied and unappropriated mineral lands of the United States in West Mountain Mining District, Salt Lake County, State of Utah, and having discovered thereon a lode of

mineral-bearing rock in place, bearing lead, iron, silver and other minerals, did then and there locate the same as the 'Uhlig No. 1' and 'Uhlig No. 2' lode mining claims, by marking the boundaries thereof upon the ground by suitable monuments, so that the boundaries thereof could be readily traced, and by posting at the points of discovery upon said mining claims respectively notices of location, describing the same by reference to natural objects and permanent monuments, that thereafter he caused copies of said location notices, respectively, to be filed and recorded in the office of the district recorder of said West Mountain Mining District. That thereafter the said Edmund H. Uhlig and the defendant, the Saint Joe Mining Company, remained in possession of said mining claims, working and developing the same and causing to be done thereon and for the benefit of said claims in each and every year up to and including the year 1900 the annual assessment work required by the laws of the United States."

The application for a patent for the Uhlig No. 1 and 2 was made on August 24, 1898. The Yes You Do was located on the 1st of January, 1898, eight years after the location of the Uhlig No. 1 and 2.

Sec. 2332 Rev. Stat. provides that "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitation for mining claims of the state and territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property attached prior to the issuance of a patent."

Sec. 2997, Subd. 2, Comp. Laws, Utah, 1888, provides that the words 'real property as used in the code of civil procedure, unless otherwise apparent from the context, are co-extensive with lands, tenements and hereditaments, water-rights, and possessory rights and claims."

The territorial Supreme Court in Houtz v. Gisborn, 1 Utah, 173-176, held that under said section, mining claims are real property and pass by deed.

There are numerous authorities which hold (without regard to statutory provisions) that mining claims are real estate. (Citing authorities.)

Sec. 2332 is applicable to lode mining claims. (Citing authorities.)

Subd. 2, Sec. 2997, Comp. Laws, Utah, 1888, is still in the Revised Statutes of 1898, Subd. 10, Sec. 2498.

A mining claim being a possessory right, it is real estate under the provisions of the statutes of Utah, before referred to, and any claim which Mayberry might have had, as he failed to institute a suit to recover the same within seven years after the possession of the Uhlig No. 1 and 2, as found by the trial court, began, was barred by Sec. 2859 of Revised Statutes of Utah, which is as follows: "No action shall be maintained, unless it appear that the plaintiff, his ancestor, grantor, or predecessor was seized or possessed of the property in question within seven years before the commencement of the action." It was also waived by his failure to adverse the application for a patent of the Uhlig No. 1 and 2. *In view of these facts, the plaintiff, even if J. Fewson Smith, Jr., had not been a deputy United States mineral surveyor, as the location of the Yes You Do was not made until eight years after the said possesison of the Uhlig Nos. 1 and*

2 was begun, could not avail himself of any rights which the said Mayberry may have had.

The decree of the court below is affirmed, with costs."

Upon said decision and judgment, plaintiff in error submits three alleged assignments of error as follows:

"1. The Supreme Court of the State of Utah erred in holding that the location of the Yes You Do lode mining claim by J. Fewson Smith, Jr., was invalid because said Smith at the time of the location was a deputy United States mineral surveyor.

2. Said court erred in holding that the court below did not err in sustaining the objection of the defendant to the introduction in evidence by the plaintiff of the notice of location of the Yes You Do lode mining claim by J. Fewson Smith, Jr., upon the ground that said location was invalid because J. Fewson Smith, Jr., at the time of the location was a deputy United States mineral surveyor.

3. Said court erred in holding that the court below did not err in sustaining the objection of the defendant to the introduction in evidence by the plaintiff of the deed from said J. Fewson Smith, Jr., to the plaintiff, Giovanni Lavagnino, for said lode mining claim upon the ground that the location of said mining claim by said J. Fewson Smith, Jr., was invalid because he at the time of the location was a deputy United States mineral surveyor and that therefore there was no valid location of said claim by said Smith."

We submit that had the trial court admitted the notice of location in evidence of the Yes You Do and had the notice been regular in form and had the plaintiff proved his alleged offers that the plaintiff had performed the annual labor and improvements required by law upon the Yes You Do mining claim; still the findings of fact would be the same as heretofore set out, for the reason that the Uhlig Nos. 1 and 2 being the prior loca-

tions and the defendants having complied with the law the result could not be other than as found by the court in favor of the defendants; so that we contend that the court rightfully held that it was immaterial whether the location of the Yes You Do mining claim was valid or not, as held by the Supreme Court of the State of Utah, and said decision by the Supreme Court of the State of Utah being based on other than a federal question, the appeal should be dismissed.

> "It often has occurred, however, and will occur again, that there are other points in the case than those of federal conizance, on which the judgment of the court below may stand; those points being of themselves sufficient to control the case.
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> But in the other cases supposed, why should a judgment be reversed for an error in deciding the federal question, if the same judgment must be rendered on the other points in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below, after they have corrected the error in the federal question?
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> We have already laid down the rule that we are not authorized to examine these other questions for the purpose of deciding whether the state court ruled correctly on them or not. We are of opinion that on these subjects not embraced in the class of questions stated by the statute, we must receive the decision of the state courts as conclusive.
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> But when we find that the state court has decided the federal question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the federal question

alone is sufficient to dispose of the case, or to require its reversal; or on the other hand, whether there exist other matters in the record actually decided by the state court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the federal question. In the latter case the court would not be justified in reversing the judgment of the state court.

But this examination into the points in the record other than the federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain if any such have been decided, and their sufficiency to maintain the final judgment, as decided by the state court.

Beyond this we are not at liberty to go, and we can only go this far to prevent the injustice of reversing a judgment which must in the end be reaffirmed, even in this court, if brought here again from the state court after it has corrected its error in the matter of the federal law." Murdock v. City of Memphis, 20 Wall. 590, 634.

"It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for discussion by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the federal laws or constitution, or that the judgment as rendered could not have been given without deciding it. Murdock v. Memphis, 20 Wall. 590; Cook County v. Calumet & Chicago Canal Co., 138 U. S. 635.

It is likewise settled law that, where the record discloses that if a question had been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question, not federal, has

been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment.

In Klinger v. Missouri, 13 Wall. 257, 263, this court, through Mr. Justice Bradley, said: "The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one.

In Johnson v. Risk, 137 U. S. 300, the record showed that the Supreme Court of Tennessee, two grounds of defense had been urged, one of which involved the construction of the provisions of the federal bankrupt act of March 2, 1867, and the other the bar of the statute of limitations of the state of Tennessee; and this court held that 'where in an action pending in a state court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court that the judgment was rested upon the disposition of the federal question; and if this does not affirmatively appear, the writ of error will be dismissed, unless the defense which does not involve a federal question is so palpably unfounded that it cannot be presumed to have been

entertained by the state court." Eustis vs. Bollis, 150 U. S. 361, 366.

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented." California Powder Works v. Davis, 151 U. S. 393.

In the case at bar it was necessary for the plaintiff in error to show by the facts that he had a prior location, that he had possession and had complied with the laws of the United States, the laws of Utah and the rules and regulations of the mining district, which was not done, before it could become material that he was denied a right under the federal statutes, as this court has held:

"But the difficulty in this case is, that, before it could be said that any right or title under a statute of the United Sttaes had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws and decisions. These were local and not federal questions. The jurisdiction of this court in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of a federal question. The writ of error must therefore be dismissed." Tel-

luride Power Co. v. Rio Grande &c. Ry., 175 U. S. 647.

Adverse proceedings under the mining laws of the United States are properly brought in the State courts and a writ of error does not lie to the Supreme Court of the United States simply because a party claims a right under such mining laws:

> "The legal import of this decision plainly is that a controversy between rival claimants under Sections 2325 and 2326 of the Revised Statutes, may be properly determined by a state court and that the judgment of a State Supreme Court in such a case, can not be reviewed by this court simply because the parties were claiming rights under the federal statute." Blackburn v. Portland Gold Mining Co., 175 U. S. 584.
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> "It is quite evident that these findings involved either questions of fact or questions of local law, and that while the finding of the ultimate fact of prior possession may possibly have been a legal conclusion, it was not a federal question. In this particular the case is covered by Ehlers v. Boatman, 111 U. S. 356, which was an action for the settlement of adverse claims to mineral lands. The case turned upon the priority of the location, which the court held was a matter of fact, although the court below called it a conclusion of law." Telluride Power Co. v. Rio Grande &c. Ry., 175 U. S. 646.

If there is a federal question in this case, it arises from Sec. 452 Rev. Stat. U. S., which reads as follows:

> "The officers, clerks and employes in the general land office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands; and any person who violates this section shall be removed from his office."

The defendants in error, however, contend that had the decision of the Supreme Court of Utah been based solely on the invalidity of the location of the Yes You Do by reason of the location having been made by J. Fewson Smith, Jr., while he was a deputy United States mineral surveyor, still this court would not have jurisdiction. This court can gain jurisdiction only through Section 709 Rev. Stat. U. S. This section is divided into three parts:

1. "Where is drawn in question the validity of a treaty or statute of, or any authority exercised under, the United States, and the decision is against the validity."

This part can not apply, as the decision was in favor of its validity.

2. "Where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity."

No state statute or authority was called in question, so that part two can not give the court jurisdiction.

3. "Where any title, right, privilege, or immunity is claimed, under the constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission or authority."

The only statute of the United States referred to in plaintiff's petition for a writ of error is said Section 452, above referred to, as will be seen by reference to plaintiff's petition (Tr. page 152, paragraph 7), as follows:

"That the Supreme Court of the State of Utah in deciding said cause and in affirming said judgment expressly held that under the laws of the

United States, Rev. St. U. S., Sec. 452 (U. S. Comp. St. 1901, page 257), said J. Fewson Smith,, Jr., at the time of making the location of the Yes You Do lode mining claim was prohibited from making said location because he was a deputy United States mineral surveyor."

The defendant in error specially set up and claimed as a bar to the claim of plaintiff in error said Section 452, and the decision of the Supreme Court of the State of Utah sustained the position of the defendant. By reference to said Section 452 it will be seen that it is a prohibitive statute, and was specially set up and claimed by defendants as a bar to plaintiff's claim, and as no right, title, privilege or immunity was asserted by plaintiff in error, he is not entitled to a review, the objection was raised by the defendant and the decision was in favor of the defendants, and therefore Section 709 Rev. St. U. S. does not give this court jurisdiction.

"There was undoubtedly a federal question raised in the case, but it was raised by the plaintiff, Nesbitt, who based his right to recover upon the Acts of Congress of November 3, 1893, and July 18, 1894, suspending the forfeiture of mining claims for failure to do the required amount of work. The decision of the court, however, was in favor of and not against, the right claimed under this statute, and of this construction the plaintiff in error is in no position to take advantage, as it made no claim under those statutes. This subject was considered in the case of Missouri v. Andriano, 138 U. S. 496, in which the contest was between rival claimants to the office of sheriff. Respondent relied upon the fact that he had received a majority of the votes cast at a popular election for the office. Relator claimed the election to be void under the state constitution, which declared that no one should be elected or appointed to office who was not a citizen of the United States. Respondent admitted his

foreign birth, but claimed that, under Rev. Stat. Sec. 2172, he became a citizen by the naturalization of his father. The decision was in his favor, and it was held that the relator had no right to a review of the question in this court, although if the judgment had been adverse to the claim of the respondent there would have been no doubt of his right to a writ of error. It was said that the right privilege must be personal to the plaintiff in error, and that he was not entitled to a review where the right or privilege was asserted by the other party, and the decision was in favor of their party, and adverse to himself. It is manifest that the object of Sec. 709 was not to give a right of review wherever the validity of an Act of Congress was drawn in question, but to prevent states from frittering away the authority of the federal government by limiting too closely the construction of the Federal Statutes. Hence the writ of error will only lie where the decision is adverse to the right claimed." De Lamar's Nevada Gold Mining Co. v. Nesbitt, 177 U. S. 524.

The defendants in error therefore contend:

1st. That as the Supreme Court of the State of Utah decided said cause on other than a federal question, and that therefore this court has no jurisdiction.

2nd. That the plaintiff in error has not brought himself within the provisions of Section 709, Revised Statutes of the United States, and therefore this court has no jurisdiction to hear the case and the appeal should therefore be dismissed.

Respectfully submitted,

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